

Exhibit H

3-9-06 hearing transcript.txt

1

1 639HVILA
1 UNITED STATES DISTRICT COURT
1 SOUTHERN DISTRICT OF NEW YORK
2 -----x
2

3 UNITED STATES OF AMERICA,
3

4 v. 05 Cr. 621 (KMK)
4

5 ALBERTO WILLIAM VILAR,
5 GARY ALAN TANAKA,
6

6 Defendants.
7

7 -----x
8

9 New York, N.Y.
9 March 9, 2006
10 2:45 p.m.

11 Before:

12 HON. KENNETH M. KARAS

13 District Judge

14 APPEARANCES

15 MICHAEL J. GARCIA
15 United States Attorney for the
16 Southern District of New York

16 MARC O. LITT
17 DEIDRE A. MCEVOY
17 Assistant United States Attorneys

18 JEFFREY C. HOFFMAN
19 SUSAN C. WOLFE
19 Attorneys for Defendant Vilar

20 GLENN C. COLTON
21 STEVEN G. KOBRE
21 Attorneys for Defendant Tanaka

22
23
24
25
25 SOUTHERN DISTRICT REPORTERS, P.C.
(212) 805-0300

2

♀ 639HVILA
1 (In open court)
2 THE DEPUTY CLERK: United States of America v. Vilar
3 and Tanaka, criminal cause for a motion.
4 Please state your appearances.
5 MR. LITT: Marc Litt, along with Deirdre McEvoy,
6 assistant U.S. attorneys, for the government.
7 with us in the back are Neil Barofsky and Rhonda Jung,
8 who are on the taint team, who have been reviewing documents

Page 1

3-9-06 hearing transcript.txt

12 very well represented and they can make an informed choice on
13 that.

14 All right. Now let's take up the question of the
15 search. The taint team can go, right, Mr. Litt, because they
16 have had enough?

17 MR. LITT: They were here for the court.

18 MR. BAROFSKY: Thank you, your Honor.

19 THE COURT: Thank you very much.

20 With respect to the search, Mr. Litt, your one and
21 only witness said that pursuant to the first paragraph of the
22 warrant he thought that the inspectors conducting the search
23 could take anything with writing on it.

24 Bottom line, if that is what the supervisor thought,
25 how could it be viewed as anything other than a license to
SOUTHERN DISTRICT REPORTERS, P.C.
(212) 805-0300

42

639HVILA

1 take, as he said, anything with writing on it, regardless of
2 how you nuance it, corporate records versus business records,
3 and how I am supposed to read one phrase next to the other?
4 The bottom line is, the person in charge interpreted it the way
5 he interpreted it.

6 MR. LITT: First of all, the court, I believe, has to
7 look at the warrant objectively. Secondly --

8 THE COURT: Aren't I also supposed to look at how it
9 was carried out?

10 MR. LITT: There is no evidence that it was carried
11 out in the way that Inspector Fider indicated that paragraph
12 could be interpreted. The evidence was to the contrary, that
13 the inspectors were throughout -- they had the rider in their
14 hands, they were looking at the rider, they were consulting the
15 rider, they were consulting with Inspector Frederico and
16 others. And if everybody had interpreted it that way, none of
17 that would have been necessary.

18 THE COURT: Inspector Fider said that he was one of
19 the people to whom those conducting the search could ask
20 questions, and if some inspector came up to him and said, I've
21 got two documents, I've got this one which is blank and this
22 one which has some handwriting on it, which one can I take,
23 which admittedly is a silly question, based on what Inspector
24 Fider said, he said, you can take the one that has the
25 handwriting on it but leave the blank one behind. That was his
SOUTHERN DISTRICT REPORTERS, P.C.
(212) 805-0300

43

639HVILA

1 perception of the first paragraph of the warrant.

2 I am just trying to understand. If any inspector came
3 to him and asked the question, why wouldn't one expect, because
4 he didn't give any details as to what questions were asked or
5 what his answers were, why wouldn't one expect his answer to be
6 if it's got writing on it, take it?

7 MR. LITT: That was his testimony sitting here on that
8 day, December 14.

9 There was no evidence that that is the advice that he
10 gave anybody who came to him. As a matter of fact, there was
11 testimony, I think the weight of the testimony, that he
12 referred most to Inspector Frederico, or at least he said if he
13 couldn't answer the question -- now, look, that wouldn't square
14 with his testimony that if he couldn't answer the question, he
15 referred the inspector to Inspector Frederico. If it was that
16 simple, that if it had writing, you took it, then he wouldn't

3-9-06 hearing transcript.txt

17 have had to refer anybody to anybody. If that is how he was
18 instructing the other inspectors to interpret the first
19 paragraph of the warrant, there wouldn't have been any
20 questions.

21 THE COURT: You will agree with me that the burden
22 here is ultimately yours, right?

23 MR. LITT: Yes.

24 THE COURT: You made a choice not to call your case
25 agent, Inspector Frederico, right?

SOUTHERN DISTRICT REPORTERS, P.C.

(212) 805-0300

44

639HVILA

1 MR. LITT: Right.

2 THE COURT: There was a fight over whether or not you
3 were required to have her testify, and I, based on the case law
4 I reviewed, said you didn't have to. But that doesn't mean
5 that by not calling her somehow you have satisfied your burden.

6 You admit it is your burden here. The only witness
7 who testified said his interpretation of the warrant was, if
8 it's got writing, it can go. I think those were even his
9 words.

10 It may very well be that Inspector Frederico had a
11 different interpretation of that first paragraph, but we don't
12 know that. So to say that he referred people to Inspector
13 Frederico doesn't really answer the question as to what the
14 searching investigators were being told, right?

15 MR. LITT: No, but I am responding --

16 THE COURT: You are saying he told them go to
17 Inspector Frederico, but we don't know what she told him. For
18 all we know she said the same thing, if it's got writing on it,
19 it goes. We don't know.

20 MR. LITT: That is true, there is no evidence in the
21 record on that.

22 THE COURT: That is my point. You would agree with me
23 that if it's got writing on it, it goes, that would probably
24 not satisfy the particularity requirement.

25 MR. LITT: Yes. If anything was taken under that --

SOUTHERN DISTRICT REPORTERS, P.C.

(212) 805-0300

45

639HVILA

1 that couldn't be justified under any other provision of the
2 warrant except for the including but not limited to of
3 paragraph one, yes.

4 THE COURT: I guess I am just trying to understand
5 then what evidence there is in the record that would suggest
6 that the other inspectors didn't have the same mind frame. The
7 idea that they carried the warrant around with them might
8 support the inference, but of course they are going to carry
9 the warrant around with them. No inspector reasonably thinks
10 they can just go into an office, take a big cart and just dump
11 the file cabinet into the bin. Nobody believes that, not in
12 this day and age.

13 So maybe, at best, what they are doing is trying to
14 determine what kind of writing it is. But not based on
15 Inspector Fider's testimony. So what evidence is there in the
16 record that the inspectors had a more narrow view of that first
17 paragraph?

18 MR. LITT: Part of the evidence in the record is the
19 quantity of documents that were taken, 60 to 70 percent, that
20 30 to 40 percent were left behind.

21 THE COURT: Do we know that the 30 or 40 percent that

3-9-06 hearing transcript.txt
22 was left behind have writing on them?
23 MR. LITT: No, that would be an inference that the
24 court would have to draw. There was no evidence presented one
25 way or the other about whether there was writing on those
SOUTHERN DISTRICT REPORTERS, P.C.
(212) 805-0300

46

♀ 639HVILA
1 documents or not.
2 THE COURT: Your tone is a little sarcastic, but my
3 question is a serious one. If they left behind reams of blank
4 paper, it would be accurate to say we left behind 30 percent of
5 the paper that we saw, but it doesn't necessarily tell us
6 anything about why things were left behind.
7 MR. LITT: Well, there was evidence that some of the
8 things that were left behind were certainly personal items.
9 THE COURT: Like a photograph I think was the example,
10 right?
11 MR. LITT: It went beyond that as well.
12 THE COURT: Such as?
13 MR. LITT: I thought he said more than photographs. I
14 would have to look at the testimony.
15 THE COURT: I recall him saying photographs. So they
16 left behind some personal photographs, and they may have left
17 behind other bulky items that could also be part of the
18 assessment as to what they left behind.
19 By the way, did the government turn over any inventory
20 of what was actually seized?
21 MR. LITT: Yes.
22 THE COURT: All right. It was a little unclear from
23 the papers as to whether or not it was an inventory of what
24 wasn't seized.
25 MR. LITT: Both.
SOUTHERN DISTRICT REPORTERS, P.C.
(212) 805-0300

47

♀ 639HVILA
1 THE COURT: I understand that. I understand both.
2 What about the point that the defense makes, that in
3 order to create that inventory you have for Fourth Amendment
4 purposes searched something that you may not have had authority
5 to do?
6 MR. LITT: There was authority to search the entire
7 office --
8 THE COURT: Right.
9 MR. LITT: -- to see what was seizable under the terms
10 of the warrant, and so the inspectors were entitled to look in
11 those file cabinets.
12 The testimony was all they did was get an overview of
13 what was there to make a list so they knew what was left
14 behind. But there is no question that the inspectors had the
15 authority to search the premises, including those file
16 cabinets.
17 THE COURT: Of course. I understand what the warrant
18 provides.
19 All right. Those are the questions I had. I don't
20 know who wants to go first on this issue because obviously
21 there are common issues here.
22 Let me just clarify one thing. Are you relying on the
23 All Records Exception, Mr. Litt?
24 MR. LITT: We do in part as an alternative argument,
25 yes. We briefed that in the first go round.
SOUTHERN DISTRICT REPORTERS, P.C.

Page 22